Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978
No. 78-1583

ALLSTATE INSURANCE COMPANY,
an Illinois corporation,

Petitioner,

v.

FRANK J. KELLEY, Attorney General
of the State of Michigan, et al,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF OF RESPONDENTS, FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN, RICHARD H. AUSTIN, SECRETARY OF STATE OF THE STATE OF MICHIGAN, JEAN CARLSON, ACTING COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN, IN OPPOSITION

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OPINIONS BELOW

The opinions of the courts below are reproduced in Petitioner's Appendix.

JURISDICTION

Petitioner invokes jurisdiction under 28 USC § 1257(3), as a purported appeal from a final judgment of the highest court of the State of Michigan. Respondents, State Officers of the State of Michigan, dispute this claim of jurisdiction and assert that no final judgment of the Michigan Supreme Court has been rendered. Respondents, State Officers of the State of Michigan, further assert that jurisdiction fails because a non-federal independent and adequate ground supports the judgment of the Michigan Supreme Court.

QUESTIONS PRESENTED

Whether the issuance of the opinion by the Michigan Supreme Court constituted a final judgment of that Court as required by 28 USC § 1257(3) in order to confer jurisdiction upon this Court.

Whether Michigan's due process clause, set forth in Michigan Const 1963, art 1, § 17, constitutes an adequate ground, independent of the federal Due Process Clause set forth in the 14th Amendment to the United States Constitution, to support the judgment of the Michigan Supreme Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the constitutional and statutory provisions referred to in the Petition this case involves Michigan Const 1963, art 1, § 17, which provides:

> "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."

This case also involves Michigan General Court Rule GCR 1963, 866.3(b):

> "Orders or Judgments Pursuant to Opinions.
>
> "• • •
>
> (b) Routine Issuance.
>
> (1) If a motion for rehearing is not timely filed under sub-rule 864.4(a), the clerk shall send a certified copy of the order or judgment to the Court of Appeals with its file and to the court or tribunal which tried the case with its record, no less than 20 or more than 30 days afters entry of the order or judgment.
>
> (2) If a motion for rehearing is timely filed, the clerk shall fulfill his responsibilities under paragraph (1) promptly after the Court denies the motion or, if the motion is granted, enter a new order or judgment after the Court's opinion on rehearing.

STATEMENT OF THE CASE

The Michigan Supreme Court's opinion that Michigan's no-fault automobile insurance law is unconstitutional is scheduled to take effect on December 8, 1979, 18 months after

the issuance of its opinion. *Shavers* v *Frank J. Kelley, Attorney General of the State of Michigan, et al,* 402 Mich at 608-609; 267 NW2d at 91-92 (1978), (App A31). The purpose of the delay in effectiveness is to allow the Legislature and the Insurance Commissioner sufficient time to correct the due process violations found in the no-fault automobile insurance law. The Michigan Supreme Court concluded that the no-fault insurance law would not satisfy constitutional due process unless the Legislature and/or the Commissioner of Insurance gives substantial meaning to the statutory standards "rates shall not be excessive, inadequate or unfairly discriminatory." Detailed minimum requirements to pass constitutional muster are set forth in the Michigan Supreme Court's opinion at page A3 of the Petitioner's Appendix. To date, as indicated by footnote 9 on Petitioner's brief, more than 10 months after the Michigan Supreme Court's mandate, no legislation nor administrative rules have been promulgated correcting the due process deficiencies of the no fault automobile insurance law. Admittedly, proposed amendments to the law and agency regulations are under consideration, as also indicated in footnote 9. Assuming that statutory amendments are enacted and regulations promulgated, the Michigan Supreme Court has retained jurisdiction and will re-examine the statutory amendments and regulations to determine whether they remedy the designated due process deficiencies.

ARGUMENT

I

THE OPINION OF THE MICHIGAN SUPREME COURT IS NOT A "FINAL JUDGMENT" UNDER 28 USC § 1257 FOR PURPOSES OF THIS COURT'S JURISDICTION, AND PETITIONER'S ALLEGATIONS OF HARM ARE PREMATURE.

This Court's review is limited by 28 USC § 1257 to "final judgments or decrees rendered by the highest court of a State." The opinion of the Michigan Supreme Court in the instant case is unequivocal: that Court did not issue a final judgment with regard to the constitutionality of Michigan's no fault automobile insurance law. Its initial opinion is that the compulsory insurance provisions of the statute deny due process of law but that opinion has not yet resulted in a final order or judgment under state law and therefore this Court is without jurisdiction to review that opinion. It is apparent that, as a matter of state law, the Michigan Supreme Court's opinion has not yet resulted in a final order or judgment, *Shavers, supra,* 402 Mich at 609-610, 638; App A31-A32, A60:

> "We therefore believe it best, for purposes of the general jurisprudence, the general welfare of the public, and the administration of justice in our state to hold the 'compulsory insurance requirement' of the No-Fault Act unconstitutional (for the reasons articulated *supra*) *effective as of 18 months from the issuance of this opinion.*
>
> "At an appropriate time before 18 months from the issuance of this opinion, we will re-examine the constitutional status of the No-Fault Act in terms of remedying the present due process deficiencies. Any party or

person wishing to file briefs or be heard shall make timely inquiry with the Clerk as to the procedure. This Court will take whatever action appears appropriate at that time.

"• • •

"An appropriate order reflecting the unconstitutional status of the No-Fault Act will enter 18 months from the issuance of this opinion. GCR 1963, 866.3(b)." (footnotes omitted, emphasis in original).

Michigan General Court Rule GCR 1963, 866.3 involves the issuance of orders or judgments pursuant to opinions and it is apparent that the final order or judgment—and not the opinion—determines finality under state law. *People* v *George*, 399 Mich 638, 250 NW2d 491 (1977). Respondents submit that the opinion of the Michigan Supreme Court is not a "final judgment" under 28 USC § 1257 because that opinion does not meet the test of finality stated in *Department of Banking* v *Pink*, 317 US 264, 268 (1942) that "the order of the appellate court has in fact fully adjudicated rights and that that adjudication is not subject to further review by a state court."

The opinion of the Michigan Supreme Court is not a "final judgment" and it is apparent that Petitioner has not been harmed by that opinion. The Petitioner will not be harmed unless and until the Michigan Supreme Court determines, in future proceedings, that the Michigan No-Fault Automobile Insurance law as it might then exist after possible revision, is constitutional. If and when such revisions are made and the statute is declared constitutional, Petitioner will have ample opportunity to assert its constitutional challenges. Petitioner may become involved in the legislative proceedings affecting possible revision of the statute and even if subsequent amendments are made, Petitioner will still have opportunity in the state courts to challenge those provisions of the statute which it feels violate its constitutional rights. Even should Petitioner fail in subsequent state proceedings, it will nevertheless have opportunity in this court to file a petition for a writ of certiorari seeking review of any final order or judgment of the Michigan Supreme Court.

II

ASSUMING, ARGUENDO, THAT THE OPINION OF THE MICHIGAN SUPREME COURT IS A "FINAL JUDGMENT" REVIEWABLE IN THIS COURT, CERTIORARI SHOULD BE DENIED BECAUSE THE OPINION RESTS UPON AN ADEQUATE INDEPENDENT BASIS IN STATE LAW.

A reading of the Michigan Supreme Court's opinion manifests that court's awareness of the Michigan Due Process Clause set forth in Michigan Const 1963, art 1, § 17. In that opinion, whenever discussing due process issues the Michigan Supreme Court carefully based its decision not only upon the Due Process Clause of the Fourteenth Amendment of the United States Constitution but also upon the Michigan constitutional provision. See 402 Mich at 590-591, 599; App A14, A22. Therefore, the Michigan Supreme Court has made it abundantly clear that its decision was based, in significant part, upon the determination that independent of federal constitutional considerations the Act violates the Due Process Clause of the Michigan constitution.

It has been a long-settled rule of this Court that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, the jurisdiction of this Court fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corporation* v *Muller*, 296 US 207, at pp 209-210 (1935). It is manifest that the Michigan Supreme Court was very careful to make clear to all parties that it rested its decision upon the Michigan Constitutional Due Process Clause and upon the United States Constitutional Due Process Clause. At no time in referring to due process did the Michigan Supreme Court ever omit the Michigan Constitutional provision if it also referred to the federal due process provision. The Michigan due process provision can stand on its own and would meet the test of *Fox Film Corporation, supra.* Furthermore, in questions concerning whether state action should be interpreted under state constitutional provisions or federal constitutional provisions, this Court has established a policy of remanding questions to the state courts if it is ambiguous as to whether the adjudication by the state court was pursuant to the state constitution or the federal constitution. This court has stated that to do otherwise would encroach upon the constitutional jurisdiction of the states. *Minnesota* v *National Tea Co*, 309 US 551, at p 557 (1940). If a reading of the Michigan Supreme Court's opinion is not sufficiently convincing that the Michigan Supreme Court has unambiguously set forth an independent and adequate state basis for supporting its judgment, then it is appropriate that this matter be remanded to the Michigan Supreme Court for clarification.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Petitioner's application for writ of certiorari be denied.

Respectfully submitted,

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